

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 99-0428 ITC
GROSS INCOME TAX
For Years 1995, 1996, AND 1997**

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ISSUE

I. Gross Income Tax – Constructive Receipt

Authority: 45 IAC 1-1-10; IC § 6-1.1-2-4; *Board of Tax Commissioners v. Jewell Grain Co.*, 556 N.E.2d 920 (Ind. Supreme Court, 1990)

Taxpayer protests the assessment Gross Income tax on the value of property taxes paid for taxpayer's property by tenant.

STATEMENT OF FACTS

Out-of-state taxpayer owns tangible property in Indiana which is leased to the user of the property. Taxpayer was assessed gross income tax on the property tax paid by the tenant pursuant to taxpayer's contract with tenant. Taxpayer protests this assessment on the basis that it did not constitute constructive receipt of the payments by taxpayer.

I. Gross Income Tax – Constructive Receipt

DISCUSSION

The Department's assessment was based on 45 IAC 1-1-10, which states:

“Gross income” defined

- (a) Except as otherwise provided in this article, “gross income” means the entire amount of receipts received by a taxpayer, actually or constructively, without any deductions of any kind or nature except as specifically allowed under IC 6-2.1-4.

- (b) Amounts included in gross income are:
 - (1) cash and checks;
 - (2) notes or other property of any value or kind;
 - (3) anything else of value received by or credited to the taxpayer in lieu of cash.
- (c) The term does not include any amounts specifically excluded by IC 6-2.1-1.

Taxpayer protest is based on the proposition that taxpayer was not responsible for the taxes at issue and that payment of these taxes by the tenant did not constitute constructive receipt of income to the Taxpayer. Taxpayer cites IC § 6-1.1-2-4, which states:

- (a) The owner of any tangible property on the assessment date of a year is liable for the taxes imposed for that year on the property.
- (b) A person holding, possessing, controlling, or occupying any tangible property on the assessment date of a year is liable for the taxes imposed for that year on the property unless:
 - (1) He establishes that the property is being assessed and taxed in the name of the owner; or
 - (2) The owner is liable for the taxes under a contract with that person.

When a person other than the owner pays any property taxes as required by this section, that person may recover the amount paid from the owner, unless the parties have agreed to other terms in a contract.

The taxpayer argues this statute allows a shift of responsibility for the property tax and that by the taxpayer transferring the responsibility for payment of these taxes to the tenant taxpayer is no longer liable for them. The Indiana Supreme Court ruled in *Board of Tax Commissioners v. Jewell Grain Co.*, 556 N.E.2d 920 (Ind. Supreme Court, 1990) at 922:

We find this statute unambiguous. Under the ordinary meaning of the words chosen by the legislature, the Board has the discretion to tax either the owner or the possessor unless the possessor can prove the owner is being taxed, or the owner has accepted liability for the tax under contract.

The statute does not clearly indicate any order of priority. The statute does not place primary tax liability on a possessor, because its provisions allow the possessor to escape liability by establishing that the property is being assessed and taxed to the owner, and to recover the amount paid from the owner unless the parties agreed to other terms in a contract. [Cite omitted]

The statute, as held by the court, imposes the tax on the property in question with the issue of who is paying being regulated but irrelevant to the underlying issue of taxation of the property in question. Indeed, pursuant to the Court's decision, the tenant [possessor] is entitled to "recover the amount paid from the owner unless the parties agreed to other terms in a contract." *ibid.*

Here, absent proof of an assumption of the duty to pay the taxes, the tenant [possessor] is not responsible for the payment.

The statute and court make explicit reference to a contract being the only defense for the owner of the property in the event of a lawsuit by the tenant to recover the tenant's payment of the property tax. A contract- by definition- requires a *quid pro quo* between the parties; thus the requirement that something of value be provided by both parties identifies the payment of the property tax by the tenant as something of value to the owner of the property.

Furthermore, if taxpayer's tenant does not pay the property tax at issue, IC 6-1-24 outlines the procedure for the seizure and sale of real property for failure to pay the taxes in question. Although- if the tenant had not already vacated the property- the tenant could lose the use of the property as a consequence of the seizure; the state's actions would be directed and limited to the seizure of taxpayer's property.

The avoidance of the seizure of taxpayer's property and the statutorily required contract to shift liability for the tax from the property owner both establish the "anything else of value received by or credited to the taxpayer in lieu of cash," identified in 45 IAC 1-1-10(b)(3) as gross income.

Taxpayer also argues the adjusted gross income statute IC § 6-3-1-3.5 does not treat this as constructive receipt of income. Taxpayer does note that this applies to the adjusted gross income tax, not the gross income tax at issue. The Department finds that in this instance there is no link between the respective sections of the code.

Consequently the Department finds that the payment of the property taxes, either by taxpayer or tenant, constitutes a value to taxpayer and the payment by the tenant of these taxes constitutes constructive receipt of gross income to taxpayer.

FINDINGS

The taxpayer's protest is respectfully denied.